UNITED STATES SENATE
REPUBLICAN
POLICY COMMITTEE

Larry E. Craig, Chairman
Jade West, Staff Director

October 21, 1997

Senators Say Civil Rights Act Should Be Interpreted As Written

Senate Leadership Files Supreme Court Brief in Piscataway, N.J. Racial Preference Case

The Republican Leadership of the Senate filed a brief earlier this month in the U.S. Supreme Court in what may be the most important case of the new term, *Piscataway Township Board of Education v. Taxman*, a case about "affirmative action" and racial discrimination in the workplace. The brief -- filed by Senators Lott, Thurmond, Nickles, Mack, Craig, Coverdell, McConnell, and Gorton -- takes a strong stand in support of Mrs. Taxman for the simple reason that she has the law on her side. The Senators' position is in sharp contrast to President Clinton's Justice Department which has taken four different positions in the case, some of them "consistent with the language and intent of the Civil Rights Act of 1964 and some of them lamentably lacking that consistency." The court is expected to issue a decision before July of next year.

I. Background

"Affirmative Action" in a Public High School. Sharon Taxman and Debra Williams taught in a public high school in Piscataway, New Jersey. When the board of education decided that it would have to lay off a teacher, it looked to Taxman and Williams because they were the two teachers with the least seniority. New Jersey law requires that layoffs be made by seniority. Mrs. Taxman and Mrs. Williams had been hired on the same day and were equal in seniority. At that point, the board could have avoided its subsequent legal troubles by simply flipping a coin. Instead, it invoked its "affirmative action" policy and dismissed Mrs. Taxman, a white teacher, because Mrs. Williams was the only black teacher in the school's business education department. Neither party disputes that the decision about Mrs. Taxman was made solely because of her race.

The Civil Rights Act of 1964. Mrs. Taxman sued, alleging that she had been discriminated against because of her race in violation of Title VII of the Civil Rights Act of 1964 which makes it an "unlawful employment practice" for an employer "to discharge

any individual . . . because of such individual's race." In response, the school board claims that a certain amount of racial discrimination is permissible under the Act so long as the discrimination is committed for an especially important purpose (in this case, faculty racial diversity).

II. The Senators' Brief

View\Print Senators' Brief

Title VII is "Color-Blind." The brief argues (*what should be*) the unremarkable proposition that Title VII means what it says. Title VII says that an employer who "discharges any individual because of such individual's race" commits an "unlawful employment practice." That language is "remarkably straightforward, individualistic, and color-blind," says the Senators' brief, and *it is that* language (and not some other policy developed elsewhere) that must govern the *Taxman* case. If an employer discharges an employee "because of such individual's race," it violates the law -- and Mrs. Taxman was discharged because of her race. Title VII "itself is the starting point for the controlling law in this case," the brief argues, and "it should also be the ending point."

History of Title VII. Title VII is the result of one of the fiercest legislative battles in congressional history. Senators debated the 1964 Act for 83 days, filling up 7,000 pages of the *Congressional Record* before ending the longest "filibuster" in Senate history. The Act passed the Senate by a vote of 73 to 27; 82 percent of Republicans and 69 percent of Democrats voted for it. It passed the House by a vote of 289 to 126; 80 percent of Republicans and 63 percent of Democrats voted for it. The decisions of Congress that were written into the Civil Rights Act were "ratified" when the Act was signed by a Democratic President from Texas, and those solemn decisions are the "supreme law of the land." U.S. Const. Art. VI, 2. Neither school boards nor courts are entitled to ignore Title VII as written.

Title VII in the Supreme Court. The Supreme Court has found an exception to Title VII's simple, consistent, and color-blind rule, and that exception is for race-based initiatives that remedy the effects of past discrimination. See especially, *Johnson v. Transportation Agency, Santa Clara Co., Calif.*, 480 U.S. 616 (1987) , and *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). The *Taxman* case, however, contains no evidence of past discrimination and (of course) no evidence of a remedial purpose. "[T]here is not even a suggestion" in the record of this case that "the Board had ever intentionally discriminated against any employee or applicant for employment on the basis of race." 832 F.Supp. at 838.

Who Can Amend the Nation's Laws? Reading the language of the Civil Rights Act in light of judicial precedents, the Third Circuit came to two essential conclusions. First,

neither the statute nor any subsequent interpretation of the statute could excuse the kind of racial discrimination that is present in this case, and second, any change in the statute must be made by the Congress and not by courts or school boards. The Third Circuit said:

> "The statute on its face provides that race cannot be a factor in employer decisions about hires, promotions, and layoffs, and the legislative history demonstrates that barring considerations of race from the workplace was Congress' primary objective. If exceptions to this bar are to be made, they must be made on the basis of what Congress has said." 91 F.3d at 1557-58. "Our dissenting colleagues would have us substitute our judgment for that expressed by Congress and extend the reach of Title VII to encompass 'means of combatting the attitudes that can lead to future patterns of discrimination.' Such a dramatic rewriting of the goals underlying Title VII does not have support in the Title VII caselaw." 91 F.3d at 1558, n. 9.

Of course, there are persons and organizations who disagree with the Civil Rights Act of 1964 as written. They have a different vision of racial justice, or a different understanding of equality, or a different definition of discrimination, and they want their vision or understanding or definition made into law. The brief says, frankly, that "they are a third of a century too late." Persons who want to change the '64 Act must make their appeal to Congress, not to the courts and not to school boards.

III. DoJ's Four Positions and Its Unsatisfactory Brief

Mrs. Taxman Defended and then Abandoned in the Lower Courts. As this case now comes before the Supreme Court, the U.S. Government is not a party to the lawsuit. Initially, however, it was the U.S. Department of Justice that sued the Piscataway Board of Education for racial discrimination. The original complaint was filed during the Bush Administration, and months after President Clinton's inauguration the Department was still arguing that Mrs. Taxman had been the victim of unlawful racial discrimination. The United States won in federal district court, *United States v. Board of Education of the Township of Piscataway*, 832 F.Supp. 836 (D.N.J. 1993), but when the board of education appealed the Department of Justice attempted to switch sides. The court of appeals refused to allow the switch, and the Department withdrew from the case, leaving Mrs. Taxman to continue her fight alone. She won again at the court of appeals. *Taxman v. Board of Education of the Township of Piscataway*, 91 F.3d 1547 (3rd Cir. 1996).

DoJ in the Supreme Court. At the Supreme Court, the Department of Justice has taken two positions. When the Court asked the Department to give its views on whether to accept the school board's petition for review, DoJ said that review should be denied even though the "court of appeals incorrectly decided an issue of broad national significance." After the High Court granted the petition notwithstanding the Department's

recommendation, the Department filed another brief saying that the judgment of the court of appeals should be affirmed, but on narrow grounds. Briefs filed on behalf of Mrs. Taxman are denominated "in support of Respondent." Interestingly, the Department's brief was not filed "in support of Respondent" but "supporting affirmance." This Department of Justice just cannot bring itself to come out *for* Mrs. Taxman.

What Law is DoJ Looking To? The Justice Department in its second brief to the Supreme Court says, "Despite the special concerns associated with the use of race in layoffs, the [Supreme] Court has never announced a *per se* rule against taking race into account in layoffs." This sentence, perhaps more than any other, sets the Department's brief apart from the Senators' brief. The Senators concede that the *Supreme Court* has not announced a *per se* rule "against taking race into account in layoffs," *but the Congress has*, and it is Congress that has the constitutional authority to *make* laws. Congress already has made a definitive law to govern this case, and that law is found in Title VII. The rule is simple and consistent and color-blind, and the Department of Justice should be defending the statute as written.

IV. Does a Color-Blind Title VII Mean the End of 'Affirmative Action'?

Title VII Forbids Racial Discrimination, Not Outreach. Title VII forbids race-based preferences and other race-based discrimination, but it does *not* prohibit outreach, recruitment, training, encouragement, or other nondiscriminatory programs or activities. "Affirmative action" properly understood may be one *means* by which an employer pursues the *end* of a racially diverse work force. Not all *means* may be used to obtain that *end*, however, and Title VII forbids the use of race-based preferences as a *means*.

The Senators' brief cites S. 950, the "Civil Rights Act of 1997" which was introduced by Senators McConnell and Hatch and others, as an example of how "affirmative action" properly understood is compatible with the principle of nondiscrimination. That bill prohibits discrimination and preferences based on race, color, national origin, or sex in the programs and activities of the Federal Government, *and* it specifically allows the use of "affirmative action" properly understood. Section 4 of the bill, titled "Affirmative Action Permitted," says that minority-owned businesses can be encouraged to bid on contracts, that minorities can be recruited into applicant pools, and that minorities can be encouraged to participate in all Federal programs and activities but that no person may be granted a preference based on race or sex.

Wisdom of Title VII. Ironically, as the brief points out, this very case demonstrates that race-neutral *means* can lead to racially diverse *ends*. To the school board's credit, there was no history of discrimination in the Piscataway schools. Yet, at "all relevant times, Black teachers were neither 'underrepresented' nor 'underutilized' in the Piscataway

School District work force. Indeed, statistics in 1976 and 1985 showed that the percentage of Black employees in the job category which included teachers exceeded the percentage of Blacks in the available work force." 91 F.3d at 1550-51 (footnote omitted).

V. Conclusion

The 88th Congress enacted the Civil Rights Act of 1964 to protect individuals against discrimination on the job. The Piscataway School Board has demonstrated over the years just how well that law can work within its community of teachers and others. The Senators' brief concludes that the Supreme Court, by affirming the judgment of the court below, can demonstrate just how well that law will work to protect the right of one lone individual whose employer (and government) discriminated against her on the basis of her race. It turns out that the simple, consistent, and color-blind standard adopted by Congress and written into the Civil Rights Act of 1964 works to the benefit of everyone.

The quoted language is from 703 of the Act, 42 U.S.C. 2000e-2(a)(1) (1994 ed.).